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Supreme Court, U.S.
FILED
DEC 23 2008
OFFICE OF THE CLERK

No. 08-842

In The
Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST,
A Professional Corporation, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN

STEVEN J. KNIGHT*
RYAN O. CANTRELL
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553

**Counsel of Record*

Attorneys for Petitioner,
Ingrid Felderhof

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The district court denied Petitioner's Rule 60(b)(1) Motion to Vacate Order on Entry of Default and to Set Aside Final Judgment. The district court entered no findings of fact or conclusions of law. On appeal, the Fifth Circuit reviewed the lengthy record and determined that Petitioner had meritorious defenses; Respondent would not be prejudiced by setting aside the default judgment; and other factors commonly considered in the context of a Rule 60(b)(1) analysis all weighed in Petitioner's favor. With respect to the "willfulness" inquiry, the Fifth Circuit *said* doubt must be resolved in Petitioner's favor and that the record does not conclusively establish willfulness. But, rather reverse the case for trial on the merits *only,* the Fifth Circuit invoked Rule 52(a) and remanded in such a way as to permit the district court to *resolve doubt*. The Fifth Circuit's remand is unprecedented in the history of Rule 60(b) and, as evidenced by back-to-back published opinions, has now become a *method* for disposing of Rule 60(b)(1) appeals. More importantly, by invoking Rule 52(a), the Fifth Circuit strayed from the required abuse of discretion standard and the approach utilized by its sister circuits. The issue is:

> In the context of an appeal from the denial of a Rule 60(b)(1) motion, does the Fifth Circuit's use of Rule 52(a) to remand conflict with fundamental public policy and equitable principles which require that it *resolve* doubt in the movant's favor in determining whether the district court abused its discretion.

LIST OF PARTIES

1. Ingrid Felderhof, Petitioner
2. Jenkens & Gilchrist, A Professional Corporation, Respondent
3. John Felderhof, Respondent
4. Groia & Company, Respondent

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 26, 2008. Petitioner filed a Motion for Rehearing, which was denied on September 24, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

- Federal Rule of Civil Procedure 60(b)(1):

  (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

  (1) mistake, inadvertence, surprise, or excusable neglect.

- Federal Rule of Civil Procedure 52(a)

  (a) Findings and Conclusions.

  (1) ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts

specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

. . .

(3) ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

STATEMENT

Factual Background

John Felderhof, a former officer of Bre-X, retained Jenkens & Gilchrist, A Professional Corporation ("Jenkens") to represent him in certain legal matters. To *secure* payment of its fees, Jenkens instructed Ms. Felderhof to transfer to Jenkens her stock in Travis Close, Inc. (which would give Jenkens possession of her residence located in Williamsburg, Virginia). Jenkens assured Ms. Felderhof that it would return the residence to her so long as Jenkens' fees were fully paid. For approximately ten years, Jenkens maintained the residence as security for its fees.

On September 8, 2006, after Ms. Felderhof paid all of Jenkens' fees (more than $2.2 million), Ms.

Felderhof asked Jenkens to return the residence as promised. Jenkens refused. On September 20, 2006, Ms. Felderhof again wrote to Jenkens, demanding it to return the residence. Jenkens again refused. Jenkens explained its position in a letter dated October 26, 2006, but not faxed to Ms. Felderhof until November 9, 2006. Jenkens represented that it " . . . *is not claiming any interest in the house* . . . " and that it was "in the difficult and untenable position of having conflicting and competing claims regarding the property."[1] Jenkens stated that if no agreement was reached *by December 4, 2006*, it would file an interpleader action.

On November 14, 2006, Ms. Felderhof responded to Jenkens' November 9, 2006 letter. The same day, Jenkens filed an interpleader lawsuit in the United States District Court for the Southern District of Texas. Jenkens pled that it "is at risk of being subject to double or multiple liability, conflicting claims and judgments from various courts regarding the ownership of Travis Close Inc. and its sole asset, the Residence."

On November 16, 2006, Ms. Felderhof was handed legal papers while in the Cayman Islands. The same day, she brought them to the office of her Cayman attorney, who was, at that time, out of the

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[1] According to Jenkens, Ms. Felderhof's ex-husband and his Canadian Counsel (Groia & Company) also asserted a claim to the residence.

country. When her attorney returned on November 28, 2006, he reviewed the documents delivered in his absence. The documents consisted of a fifty-three page complaint and exhibits, but did not include a summons or a deadline for answering.

In mid-December, 2006, Ms. Felderhof received papers indicating that a pre-trial conference had been scheduled for February 14, 2007. Ms. Felderhof again notified her attorney immediately. With no summons, Ms. Felderhof and her attorney were unaware of any other court deadline. As Ms. Felderhof stated in her affidavit, "I never for a minute thought of not attending *or being represented* at that hearing once I knew about it. I would do the same for any hearing or any deadline that I knew about."

The summons Jenkens claims was served on Ms. Felderhof on November 16, 2006 states that an answer must be filed in thirty days, *i.e.*, by December 16, 2006. On Friday, December 15, 2006, before an answer was even due, Jenkens filed a "request for entry of default." Jenkens' Certificate of Service does not include a post office box number or a post office code.[2] It lists Ms. Felderhof's *physical address only*. Ms. Felderhof never received Jenkens' filing.

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[2] The Cayman Island Postal Service does not make deliveries to physical addresses. Rather, all mail to Island residents must be addressed to a specific post office box number and must include the correct postal office code. Though Jenkens was aware of Ms. Felderhof's post office box and correct postal code, after Ms. Felderhof sent the November 14, 2006 demand letter,

(Continued on following page)

On Monday, December 18, 2006, the district court signed an order setting Jenkens' request for entry of default for hearing on January 5, 2007. Jenkens was required to issue a notice to Ms. Felderhof concerning the order. Jenkens' Certificate of Service is dated *December 27, 2006,* and, once again, does not include a post office box number or a post office code, only Ms. Felderhof's *physical residential address.* Assuming Jenkens mailed the notice, it would have been returned undelivered to Jenkens in accordance with the Cayman Post Code. (*See* footnote 2, *supra*). Ms. Felderhof never received Jenkens' request for entry of default or its notice of the January 5, 2007 hearing.

On January 5, 2007, the district court granted Jenkens' request for entry of default. Three days later, Jenkens filed a motion for summary judgment, and, contrary to its earlier representation that it was not claiming an interest in the residence, sought a declaration that it is the sole owner of the residence. Once again, the Certificate of Service on Jenkens' motion does not include a post office box number or a post office code, only Ms. Felderhof's (incomplete) *physical residential address.* The Cayman Islands Postal Service returned the motion to Jenkens undelivered on or about February 28, 2007. The district court granted Jenkens' motion *the day after it was filed.*

Jenkens began incorrectly addressing mail intended for Ms. Felderhof by sending it to a physical address where it could not be delivered.

Ms. Felderhof first received notice of the default judgment (by a Canadian journalist) on or about January 11, 2007. This was the first notice Ms. Felderhof or her Cayman attorney received that would show proceedings were underway in the lawsuit. She immediately obtained local Texas counsel and undertook substantial efforts to vacate the default taken against her by her former attorneys.

Proceedings Below

Ms. Felderhof filed a motion to set aside the order on entry of default and to vacate the final judgment under Rule 60(b)(1). Ms. Felderhof established that she has meritorious defenses to all of Jenkens' claims and that Jenkens would not be prejudiced by setting aside the default judgment. Ms. Felderhof also asserted that her failure to answer was not willful; rather, it was an excusable mistake caused by the fact that the summons was not included with the documents inspected by her attorney after she immediately brought them to his firm, and that she did not receive any of Jenkens' filings, including its request for entry of default, its notice of hearing and its motion for summary judgment.

On April 2, 2007, the district court denied Ms. Felderhof's motion, without conducting an evidentiary hearing or offering any explanation or analysis. Ms. Felderhof appealed.

On August 26, 2008, the Fifth Circuit vacated the denial of relief under Rule 60(b)(1) and held that Ms. Felderhof has meritorious defenses; Jenkens would

not be prejudiced by setting aside the default; and other factors weighed in favor of setting aside the default, including her prompt efforts to seek relief from the judgment and the amount in dispute. With respect to the willfulness element, the Fifth Circuit recognized, consistent with other circuits: "Because there are no countervailing equities (*i.e.*, because Jenkens has not presented a legitimate claim of prejudice that would arise from setting aside the default), 'any doubt should, as a general proposition, be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits.'" The court even declared that: "*we must also assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their responsive duties under the circumstances.*" However, the Fifth Circuit ultimately failed to resolve doubt in Ms. Felderhof's favor, and, instead, relied upon an inapplicable analysis under Rule 52(a) to allow the district court a second opportunity to explain its findings.[3]

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[3] On October 1, 2008, on remand, the district court entered a seven-page order denying relief for the second time. Ms. Felderhof appealed. That case is pending in the Fifth Circuit. (Fifth Circuit Cause Number 08-20642).

ARGUMENT

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's reliance on Rule 52(a) in the context of an appeal from the denial of relief under Rule 60(b)(1) disregards the abuse of discretion review standard and conflicts with the requirement that doubt must be *resolved* in favor of the defaulting party. The Fifth Circuit's new published precedent is a far departure from established case law from other circuits and it conflicts with the equitable underpinnings of Rule 60(b).

The district court did not offer any findings in support of the denial of Ms. Felderhof's motion to set aside the default judgment. The Fifth Circuit determined, correctly, that under Rule 52(a)(3), the trial court was not *required* to enter findings. But rather than review the record to determine whether the denial of relief was an abuse of discretion (or to attribute the lack of findings to an abuse of discretion as some courts have done[4]), the Fifth Circuit analyzed

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[4] *See Emcasco Ins. Co., v. Sambrick*, 834 F.2d 71 (3d Cir. 1987); and *Enron Oil Corp v. Diakuhara*, 10 F.3d 90, 96-97 (2d Cir. 1993) ("[T]he importance of an explanation by the district court for its denial of a motion to vacate in light of these criteria is self-evident . . . [it] defeats intelligent appellate review. While the failure of a district judge to provide an explanation is not always fatal – so long as it is possible to discern that the appropriate criteria have been satisfied . . . – it remains true that a trial court should provide specific reasons for a denial of a motion to set aside a default . . . ").

only whether, under Rule 52(a), a *remand for the omitted factual or legal findings* is proper.

The Fifth Circuit cited case law construing a trial court's Rule 52 obligation to enter findings following *a bench trial*. Under those cases, a remand for additional findings on matters omitted in the district court's initial findings may be proper so long as the appellant can show on appeal that the record could support relief in the appellant's favor. Otherwise, remand would be futile.

This Fifth Circuit's use of the Rule 52 standard in the context of an appeal from the denial of relief under Rule 60(b)(1) is as unprecedented as it is problematic. Among other things, it (1) disregards the abuse of discretion standards; (2) relies on case law that is not applicable; (3) creates an irreconcilable conflict with case law in other circuits; and (4) establishes a precedent that is contrary to public policy and wasteful of judicial resources.

A. The Fifth Circuit's analysis disregards the controlling review standard.

The standard of review on appeal following the denial of relief under Rule 60(b)(1) is well established. In the Fifth Circuit, as well as other circuits, an appeal from the denial of a Rule 60(b)(1) motion to set aside a default judgment is reviewed for an abuse of discretion. *Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir. 2000). "'Because of the seriousness of a default judgment, even a slight abuse of discretion may

justify reversal.'" *Id.* (citing *CJC Holdings, Inc, v. Wright & Lato, Inc.*, 979 F.2d 60, 63 n.1 (5th Cir. 1992); *United States v. One Parcel of Real Property*, 763 F.2d 181, 183 (5th Cir. 1985)). *See also Enron Oil Corp.*, 10 F.3d at 96-98 (finding that the trial court made no findings as to willfulness; but that "all doubts [as to willfulness] must be resolved in favor of trial on the merits"; and that "had [the trial court entered findings on the good cause standard] it would have granted the motion to set aside the entry of default"). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *McClure v. Ashcroft,* 335 F.3d 404, 408 (5th Cir. 2003).

Although the Fifth Circuit recognized, initially, that it is bound by this standard and properly analyzed the other factors under this standard, it ultimately veered from it simply because the district court entered no factual and legal findings. Instead of asking whether the district court abused its discretion in denying relief under Rule 60(b)(1), the court of appeals asked whether Ms. Felderhof presented enough evidence to make a remand for factual findings not futile. This new and unprecedented standard marks a sharp departure in the standard of review following the denial of a Rule 60(b)(1) motion to set aside a default judgment.

B. *Armstrong* and *Kratzer* are not applicable.

In framing the analysis in terms of whether it is proper to remand the case to the trial court for the possibility of further findings to resolve doubt, the Fifth Circuit cited *Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976) and *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477, 483 (5th Cir. 1981). However, those cases involve situations in which findings are specifically required at the conclusion of a bench trial. They do not involve an appeal from the denial of a Rule 60(b)(1) motion, in which the applicable standard is abuse of discretion.

In *Armstrong*, a habeas corpus proceeding, Armstrong complained on appeal that, following a bench trial, the trial court failed to make certain findings which Armstrong believed affected his right to habeas corpus relief. The Fifth Circuit held that "Rule 52(a), FED. R. CIV. P., requires the district court to make findings of fact and conclusions of law in 'all actions tried upon the facts without a jury.'" *Id.* at 77. Where a trial court fails to make findings as required by statute, "the normal procedure is to vacate the judgment and remand the case for appropriate findings." *Id.* However, a remand is only proper where further findings *would not* be futile. For example, a remand is proper if the record shows that there is a genuine issue as to material fact. *Id.* at 77.

Similarly, in *Kratzer*, the trial court conducted a bench trial in a personal injury action. On appeal, the defendant argued that the trial court erred in failing

to enter findings of fact and conclusions of law with respect to one of its defenses. *See Kratzer*, 645 F.2d at 583. The Fifth Circuit concluded that the district court is required to make findings of fact and conclusions of law in "'all actions tried upon the facts without a jury. . . .'" *Id.* at 483. "If a court does not comply with the Rule, the normal procedure for the appellate court is to vacate the judgment and remand the case for appropriate findings." *Id.* However, a remand is not always appropriate, such as where there are no disputes that are material to the outcome of the case on appeal. *See id.*

Both *Armstrong* and *Kratzer* stand for the proposition that, where a trial court is *required* to enter findings following a bench trial but fails to do so, the court of appeals should vacate the judgment and remand for further findings if there is material doubt in the record to resolve. The need to remand in situations such as those presented in *Armstrong* and *Kratzer* presupposes two things that are lacking in the context of an appeal from a Rule 60(b)(1) motion to set aside a default judgment: (1) a statutory requirement to enter findings, and (2) the lack of another *controlling* legal mechanism to resolve the doubt.

C. Remanding with the option to enter findings on willfulness conflicts with case law from other circuits and the well-established rule that doubt must be resolved in favor of the defaulting party where there are no competing equities.

The mechanism to resolve any doubt in a Rule 60(b)(1) analysis is well established: "*Where there are no intervening equities, any doubt should, as a general proposition, be resolved in favor of the movant to the end of securing a trial upon the merits.*" *General Tel. Corp. v. General Tel. Answering Service*, 277 F.2d 919, 921 (5th Cir. 1960) (citing *Moore*, FED. PRAC., vol. 6 § 55.10(1)) (emphasis added). *See also Enron Oil Corp.*, 10 F.3d at 96 ("Yet, because defaults are generally disfavored and are reserved for *rare occasions*, when doubt exists as to whether a default should be granted or vacated, the doubt should be *resolved* in favor of the defaulting party.") (emphases added). Once doubt is resolved in favor of trial on the merits, the case should be remanded for trial, not for the opportunity for the district court to explain its perception of the doubt – something it already had the opportunity to do when it first ruled on the Rule 60(b)(1) motion.

The requirement that doubt be resolved in the defaulting party's favor cannot be disregarded. The requirement is based on important public policy considerations adopted in the Fifth Circuit and grounded in Rule 60(b). *See Gen. Tel. Corp.*, 277 F.2d at 921. In *Butner v. Nuestadter*, 324 F.2d 783, 786

(9th Cir. 1963),[5] the Ninth Circuit addressed a factually analogous scenario. Faced with competing interpretations of the willfulness of the defendant's actions, the Ninth Circuit recognized that some doubt existed as to the defaulting party's intent. The historical origins of Rule 60(b) demanded that any such doubts be resolved in favor of the movant to the end of securing a trial on the merits. In so holding, the court cited a defining case from the Supreme Court of California for the following understanding of the public policy underpinning of section 473:

> "It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." * * * It is also well settled that it is the policy of the law to bring about a trial on the merits wherever possible, so that any doubts which may exist should be resolved in favor of the application, to the end of securing a trial upon the merits.

Butner, 324 F.2d at 786 (quoting *Brill v. Fox*, 211 Cal. 739, 743 (Cal. 1931)). Importantly, the policy applies even where a movant cannot make a strong showing of inexcusable neglect. *Id.* (citing *Karlein v. Karlein*, 103 Cal. App. 2d 496, 498 (Cal. App. 2d Dist. 1951)).

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[5] Notably, Rule 60(b) is based upon section 473 of the California Code of Civil Procedure. *See Fiske v. Buder*, 125 F.2d 841, 844-45 (8th Cir. 1942).

The Fifth Circuit's opinion acknowledges that resolution of doubts in the movant's favor is the correct standard, but it failed to apply it. The Fifth Circuit said: "Because there are no countervailing equities (*i.e.*, because Jenkens has not presented a legitimate claim of prejudice that would arise from setting aside the default), 'any doubt should, as a general proposition, be resolved in favor of [Ms. Felderhof] to the end of securing trial upon the merits.'" (quoting *General Tel. Corp.*, 277 F.2d at 921). The Fifth Circuit further stated that "[w]hile there is evidence suggestive of willfulness on the part of Ms. Felderhof, resolving doubts in Ms. Felderhof's favor, we do not believe the record conclusively shows that her default was willful." And that "a number of the factors relevant to a good cause determination under Rule 60(b)(1) appear to cut in Ms. Felderhof's favor – and the record does not indisputably support a denial or Rule 60(b)(1) relief on 'willfulness' grounds." The correct outcome – the one consistent with the public policy of favoring trial on the merits and the approach utilized overwhelmingly by its sister circuits – is to remand for trial on the merits.

By employing Rule 52(a) as a tool to give the district court a second opportunity to enter findings, the Fifth Circuit has established case law that conflicts with that of other circuits. Other circuits routinely resolve doubts in favor of the movant, even in the face of non-existent or limited findings from the district court. *See Enron Oil Corp.*, 10 F.3d at 96 ("because defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to

whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party."); *Schwab v. Bullock's, Inc.*, 508 F.2d 353, 355-56 (9th Cir. 1975) ("The meritoriousness of the defense coupled with the lack of any significant prejudice to plaintiff should have led the district court to resolve in BBSK's favor any doubts in connection with the motion to vacate. This the district court failed to do."); *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980) ("On a motion for relief from the entry of a default or a default judgment, all doubts are resolved in favor of the party seeking relief."); *United States v. Moradi*, 673 F.2d 725, 728 (4th Cir. 1982) ("Finally, doubt as to this matter, or as to the propriety of giving relief generally, must be resolved in appellant's favor since the record clearly discloses he bears no personal responsibility for the failure to answer punctually or to appear at the pre-trial conference."); *Burrell v. Henderson*, 810 F.2d 624, 628 (6th Cir. 2006) (holding that the district court abused its discretion by failing to acknowledge evidence favorable to the movant); *Passarella v. Hilton Int'l Co.*, 810 F.2d 674, 678 (7th Cir. 1987); *Velazquez v. Sea-Land, Inc.*, 920 F.2d 1072, 1079 (1st Cir. 1990) ("[i]n a close case, doubts should be resolved in favor of adjudicating contested claims on the merits.") (citing *Coon v. Grenier*, 867 F.2d 73, 79 (1st Cir. 1989) (remanding for proceedings on the merits despite the existence of very few findings).

In each of the cases cited herein (*Enron Oil Corp, Butner, Schwab, Jackson, Passarella, Moradi, Burrell,*

Velazquez, and *Coon*), the reviewing courts identified doubt that existed in the record, and, in each case, the court properly resolved the doubt in favor of the moving party to the end of securing a trial on the merits. Indeed, in *Enron Oil Corp, Velazquez* and *Coon*, the reviewing courts undertook this analysis with little or no findings from the district court as guidance. None of these courts remanded for further findings from the district court under the authority of Rule 52(a).

By remanding for further findings under Rule 52(a), the Fifth Circuit has established new precedent that fails to apply the correct doubt-resolution process embedded in Rule 60(b)(1) review. This Court should, therefore, grant this Petition and confirm that which other circuits have routinely confirmed – public policy requires that, absent countervailing equities, doubt be resolved in the defaulting party's favor.

D. The Opinion establishes precedent that is against public policy.

The Fifth Circuit's finding that this case should be remanded under Rule 52, presupposes, at a minimum, that "the record could support a finding" in the movant's favor. Such a finding is sufficient to warrant relief under Rule 60(b)(1). As the Fifth Circuit has held: "Rule 60(b) is applied most liberally to judgments of default, since trial on the merits is to be favored over such a truncated proceeding. Unless it appears that no injustice results from the default,

relief should be granted." *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 895 (5th Cir. 1984).

The ultimate danger of allowing *Jenkens & Gilchrist v. Groia & Company*, 542 F.3d 114 (5th Cir. 2008), to be left as citable, published Fifth Circuit precedent is that a district court that erroneously denies relief to a worthy Rule 60(b)(1) movant can perform an incomplete analysis, make no findings, or even apply an incorrect standard and know that its decision will not be reversed *and remanded for trial.* To the contrary, a district court will be given a second opportunity to bolster its conclusions. A litigant in Ms. Felderhof's position is thus forced to appeal twice, which taxes the litigant's and judicial resources.

The snowball has already begun to gain momentum. *See In re OCA, Inc.*, ___ F.3d ___, 2008 WL 5147487 (5th Cir. 2008) (where the Fifth Circuit, citing *Jenkens & Gilchrist,* remanded a case back to the district court to allow it to apply the correct standard on the willfulness issue rather than find that its application of the incorrect standard – clear and convincing evidence – was an abuse of discretion).

Under a proper abuse of discretion standard, a district court that applies an incorrect legal standard to its Rule 60(b)(1) analysis will be reversed so that the case may proceed on the merits. Likewise, a district court that makes no findings at all, such as in this case, will be reversed where the record shows a

lack of a clear case of willfulness. In the end, district courts' analyses will improve without the necessity of multiple opportunities to enter findings after multiple appeals.

CONCLUSION

The remand for further findings standard discussed in *Armstrong*, 536 F.2d at 72 and *Kratzer*, 645 F.2d at 477, now adopted by the Fifth Circuit in the context of a Rule 60(b)(1) analysis, misapplies the applicable abuse of discretion standard of review and conflicts sharply with the requirement that disputed facts must be resolved in favor of the defaulting party, which is uniformly applied by other circuits. The Fifth Circuit's Opinion establishes a precedent contrary to key public policy underpinnings of Rule 60(b)(1), and it encourages unnecessary and prolonged judicial proceedings. For all of these reasons, Petitioner respectfully requests that this Court grant her Writ of Certiorari.

Respectfully submitted,

CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN

STEVEN J. KNIGHT*
RYAN O. CANTRELL
Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553

**Counsel of Record*

542 F.3d 114

United States Court of Appeals, Fifth Circuit.

JENKENS & GILCHRIST, A Professional Corporation, Plaintiff-Appellee,

v.

GROIA & COMPANY, A Professional Corporation, Defendant-Appellee,

v.

Ingrid **Felderhof**, Defendant-Appellant.

No. 07-20296.

Aug. 26, 2008.

Daniel V. Flatten (argued), Nancy Hahn Elliott, Porter Hedges, Houston, TX, for Plaintiff-Appellee.

Steven J. Knight (argued), Chamberlain, Hrdlicka, White, Williams & Martin, Houston, TX, for Ingrid Felderhof.

Thomas Mente Benjamin (argued), Alan H. Goodman, Lemle & Kelleher, New Orleans, LA, for Groia & Co.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and DAVIS and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Ingrid Felderhof appeals the district court's denial of her motion, filed pursuant to FED.R.CIV.P. 60(b), to vacate the default judgment entered against her. For the following reasons, we affirm in part, vacate in part, and remand.

I

During 1997, John Felderhof and his wife, Ingrid Felderhof, were under investigation by the Canadian government and the United States' Securities and Exchange Commission regarding the development of gold mining prospects by Bre-X Minerals, Ltd. Mr. Felderhof was a director and senior executive with Bre-X. In response to the investigations, the Felderhofs obtained legal representation from Jenkens and Gilchrist ("Jenkens"). Worried that the Felderhofs' assets may be frozen or seized as a result of the investigations, Jenkens entered into the Modified Legal Representation Agreement (the "Agreement") with the Felderhofs. Aside from payment for hourly fees, the Agreement provided that Jenkens was to be paid a non-refundable $1-million-dollar retainer. This retainer was to be paid in cash or valuable assets. Around the same time that she entered into the Modified Agreement, Ms. Felderhof transferred to Jenkens all of the shares of Travis Close, Inc. The sole asset of Travis Close was a home in Williamsburg, Virginia.[1]

In 2006, after Jenkens completed its work for the Felderhofs, Ms. Felderhof sent a letter to her counsel at Jenkens suggesting that they arrange to transfer the Williamsburg home back to her. Her letter claimed that Jenkens only agreed to hold the home as

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[1] Ms. Felderhof also transferred to Jenkens a Lamborghini automobile that was subsequently sold by Jenkens.

"caretaker," and that once all fees were paid that the home would be returned to her. Counsel from Jenkens responded, explaining that Jenkens was not merely "caretaker" of the home, and that because there were competing claims to the home, Jenkens could be forced to commence an interpleader action.

Jenkens subsequently filed an interpleader complaint in the Southern District of Texas to finally resolve ownership of Travis Close, Inc. and the Williamsburg home. The complaint named Groia & Company (a Canadian law firm that had represented the Felderhofs and claimed an interest in proceeds from the sale of the residence), John Felderhof, and Ingrid Felderhof as defendants. Groia and John Felderhof filed answers admitting most of the factual allegations in Jenkens' interpleader complaint. Ms. Felderhof did not file an answer. The facts surrounding Ms. Felderhof's failure to file an answer are as follows.

On November 16, 2006 in the Cayman Islands, Ms. Felderhof was personally served with a packet of papers including Jenkens' complaint. The parties dispute whether these papers included a summons as required under FED. R. CIV. P. 4. Upon receiving these papers, Ms. Felderhof took them to the offices of her lawyer, John Chapman, in Grand Cayman. Chapman was out of the country and did not return until November 28. Upon return, he reviewed the papers brought to his office by Ms. Felderhof.

Subsequently, Ms. Felderhof was served with a copy of the district court's Order for Conference and Disclosure of Interested Parties. The order required counsel to appear for a pre-trial conference and file a certificate of persons or entities with a financial interest in the litigation within fifteen days. Ms. Felderhof never filed the requisite certificate.

Because Ms. Felderhof never filed an answer, Jenkens filed a motion for entry of default as to Ms. Felderhof which was granted by the district court. Jenkens, Groia, and John Felderhof then filed a joint motion for summary judgment seeking to have the court declare, *inter alia,* that Jenkens is the sole and lawful owner of the stock of Travis Close, Inc. and its sole asset, the Williamsburg home. The district court granted the joint motion and entered final judgment declaring Jenkens the sole owner.

After learning of the default judgment against her, Ms. Felderhof filed a motion in the district court to have the default judgment set aside pursuant to FED. R. CIV. P. 60(b)(1) and FED. R. CIV. P. 60(b)(4). Rule 60(b)(1) provides that a party may be relieved from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." Ms. Felderhof argued that her neglect in failing to answer was excusable under FED. R. CIV. P. 60(b)(1) because she was never served with a summons, or in the alternative because the summons was lost prior to her or her attorney ever seeing it; and that she never learned of her duty to answer. Rule 60(b)(4) provides that a party may be relieved from a final judgment if it is determined that

"the judgment is void." Ms. Felderhof argued that the default judgment was void under FED. R. CIV. P. 60(b)(4) because she was never served with a summons, and thus, the court never had personal jurisdiction over her. After receiving briefing, affidavits, and documentary evidence, the district court summarily denied Ms. Felderhof's motion.

II

The district court's order provided no factual finding as to whether Ms. Felderhof was served with a summons. Nor did the district court address any of the factors traditionally considered in determining whether relief from a default judgment is proper under Rule 60(b)(1).

We review *de novo* a district court's conclusion as to whether a judgment is void for lack of personal jurisdiction under Rule 60(b)(4). *See Goetz v. Synthesys Technologies, Inc.*, 415 F.3d 481, 483 (5th Cir.2005). We review the district court's denial of relief under Rule 60(b)(1) for abuse of discretion. *See Lacy v. Sitel Corp.*, 227 F.3d 290, 292 (5th Cir.2000). "Because of the seriousness of a default judgment, and although the standard of review is abuse of discretion, even a slight abuse of discretion may justify reversal." *Lacy*, 227 F.3d at 292. We normally review the district court's factual conclusions for clear error. *See Lacy*, 227 F.3d at 292 (noting that factual determinations underlying a 60(b)(1) denial are reviewed for clear error); *Goetz*, 415 F.3d at 483

(noting that clear error applies to factual findings related to 60(b)(4) rulings). However, in this circumstance, we analyze the district court's denial of relief under Rule 60(b)(1) and 60(b)(4) in light of the lack of findings provided by the district court.

III

A

We turn first to Ms. Felderhof's argument under Rule 60(b)(4). On appeal, Ms. Felderhof argues that the district court's judgment was void under Rule 60(b)(4) because she was not served with a summons as required under Rule 4. *See* FED. R. CIV. P. 4(c) ("A summons must be served with a copy of the complaint."); *Recreational Props., Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314 (5th Cir.1986) ("If a court lacks jurisdiction over the parties because of insufficient service of process, the judgment is void and the district court must set it aside.").[2] While the

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[2] Ms. Felderhof's only contention under Rule 60(b)(4) relates to her failure to receive a summons. Ms. Felderhof raises no argument that personal service of both the complaint and summons would not satisfy the process requirements of Rule 4(f)(1). Rule 4(f)(1) provides that an individual in a foreign country may be served "by any internationally agreed means of service . . . such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." FED.R.CIV.P. 4(f)(1).

Ms. Felderhof also contends that she did not receive "proper notice" of Jenkens application for default judgment pursuant to FED.R.CIV.P. 55(b)(2). However, the notice requirement of Rule

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district court failed to resolve the disputed facts surrounding the service of summons, FED.R.CIV.P. 52(a)(3)[3] indicates that a district court is not required to state findings or conclusions when deciding a Rule 60(b) motion. Moreover, even where findings are specifically required at the conclusion of a bench trial, under FED.R.CIV.P. 52(a)(1), we have recognized that a remand for specific findings is unnecessary "if a complete understanding of the issues may be had without the aid of separate findings." *Armstrong v. Collier,* 536 F.2d 72, 77 (5th Cir.1976). "[A] remand is often deemed unnecessary if all the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all the facts relied upon to support the judgment are in the record and are undisputed, or if the record as a whole presents no genuine issue as to any material fact." *Id.* We have also stated that a remand is not necessary if "the record would not support" a finding in the appellant's favor, and if such a finding would be deemed clearly erroneous had it been made. *See Kratzer v. Capital Marine Supply, Inc.,* 645 F.2d 477, 483 (5th Cir.1981).

55(b)(2) only applies to parties that have "appeared" prior to the entry of a default judgment. While "we have taken an expansive view as to what constitutes an appearance under Rule 55(b)(2)," Ms. Felderhof made no contact with the court or opposing parties until after the entry of default judgment. *Rogers v. Hartford Life & Acc. Ins. Co.,* 167 F.3d 933, 936 (5th Cir.1999).

[3] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." FED.R.CIV.P. 52(a)(3).

Applying the above rule to determine whether a remand is necessary in this instance, we ask whether the record could support a finding in Ms. Felderhof's favor as to the service of the summons.

The evidence before the district court concerning service of the summons was as follows. Jenkens submitted a copy of a signed return of service form. Jenkens also submitted two affidavits from the process server. The process server averred that he personally served the complaint and summons on Ms. Felderhof at a Grand Cayman shopping mall on November 16, 2006. Finally, Jenkens submitted a copy of a summons directed to Ms. Felderhof that had been issued by the district court on November 14, 2006 and initialed by the process server. The process server averred that [illegible] Felderhof submitted affidavits from herself and Chapman, her attorney in the Cayman Islands. Ms. Felderhof admitted that she was served with a bundle of what looked like "legal papers" while at a shopping mall on November 16. However, she averred that she did not review the papers served on her. Instead, she took them to Chapman's office on November 16. Chapman was out of the country until November 28. Chapman averred that upon returning to his office he reviewed the papers that had been dropped off by Ms. Felderhof twelve days prior. His affidavit states that, on November 28, there was no summons amongst the papers he reviewed.

The only evidence that could support Ms. Felderhof's position is the averment by her attorney that, 12 days after service, the summons was not in the pack of papers in his office. The statement of her attorney regarding the content of the pack of papers on November 28 does not rebut the process server's affidavit, and it does not create a material issue of fact as to whether Ms. Felderhof was served with a summons on November 16. The record cannot support a finding in Ms. Felderhof's favor, and had the district court concluded that Ms. Felderhof was not served with the summons, such a finding would have been clearly erroneous. Accordingly, the district court did not err in denying Ms. Felderhof relief from the default judgment under Rule 60(b)(4) based on her claim that she was not served with a summons.

B

We next consider Ms. Felderhof's claim for relief from the default judgment under Rule 60(b)(1). In determining whether good cause exists to set aside a default judgment under Rule 60(b)(1) we examine the following factors: "whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." *In re Dierschke,* 975 F.2d 181, 183 (5th Cir.1992). Courts may also consider whether the public interest was implicated, whether there was significant financial loss to the defendant, and whether the defendant acted expeditiously to correct the default. *See id.* at 183-84. The district court need

not 'consider all of the above factors in ruling on a defendant's 60(b)(1) motion; "the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause.'" *Id.* at 184.

However, two of the above factors carry special significance. A district court has the discretion to refuse to set aside a default judgment under 60(b)(1) if the defendant "fails to present a meritorious defense sufficient to support a finding on the merits for the defaulting party." *Lacy,* 227 F.3d at 293. Also, if a district court finds a defendant's default to be willful, then the district court need not make any other finding. *See Dierschke,* 975 F.2d at 184.

The district court reached no finding as to willfulness, prejudice, or the merit of Ms. Felderhof's asserted defenses. Nor did the district court provide any indication as to whether the remaining factors favor granting or denying relief from the default judgment under Rule 60(b)(1). Again applying the above-stated rule that remand is unnecessary where the record would not support a finding in Ms. Felderhof's favor, we examine the above factors to determine whether the district court's 60(b)(1) denial may be affirmed despite the lack of specific findings by the district court.[4]

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[4] Because of the drastic nature of default judgments, the Third Circuit has indicated that a district court errs if it denies a motion to set aside a default judgment under 60(b)(1) without

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We first address whether Ms. Felderhof has presented a meritorious defense. In her motion to set aside the default judgment, Ms. Felderhof's most basic defense on the merits was to deny Jenkens' factual allegations regarding the transfer of the Travis Close stock and the Williamsburg home. Jenkens claimed that the stock and home were part of its $1 million non-refundable retainer under the Modified Agreement. Ms. Felderhof claimed that the parties reached a different agreement which provided that Jenkens held the stock and the home to secure payment of fees, and that Jenkens would return the home to her once Jenkens' fees were paid.

To support its claim to the residence, Jenkens submitted to the district court the Modified Agreement. The Modified Agreement was signed by the Felderhofs on May 16, 1997 but was intended to "memorialize[] the revised agreement [the parties] reached conceptually on May 6." The Modified Agreement does not, by its terms, refer to the stock of

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addressing certain necessary factors. *See Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71, 73-74 (3d Cir.1987) (reversing district court where it based its decision on a defendant's delay in answering without addressing prejudice or meritorious defense elements). While we agree that findings are useful for appellate review, they are not required under Rule 52(a), and therefore a lack of findings does not *per se* result in reversal or vacatur. *See Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96-97 (2d Cir.1993) (noting that a district court should provide specific reasons but that a lack of explanation for denying relief from default is not fatal "so long as it is possible to discern that the appropriate criteria have been satisfied").

Travis Close or the Williamsburg home as being part of the $1 million non-refundable retainer. The Modified Agreement simply states that the retainer can be paid with "cash or other valuable assets." The Agreement states that Jenkens had received "certain assets of uncertain value" but does not identify the stock or the home as part of the "valuable assets" used to satisfy the retainer. Jenkens also provided the affidavit of Andrius Kontrimas, a Jenkens attorney, who served as Ms. Felderhof's counsel. Kontrimas averred that the stock transfer was "part of the consideration for the Modified Agreement" and that Ms. Felderhof agreed to transfer the Residence "free and clear of any liens or encumbrances." An affidavit from Joseph Groia, the Felderhofs' Canadian counsel states that "[a]t the time of entering into the agreement with Heenan Blaikie [the predecessor law firm to Groia & Company], the Felderhofs agreed to assign a non-cash asset for both the benefit of Jenkens and Heenan Blaikie. The non-cash asset was the stock of Travis Close." Jenkens submitted two stock certificates – one dated January 2, 1997 indicating Ms. Felderhof's ownership of the Travis Close stock, and another dated December 30, 1997 indicating Jenkens' ownership of the Travis Close stock. Jenkens also submitted what appears to be a blank stock transfer agreement signed by Ms. Felderhof on May 6, 1997. The blank agreement does not contain any information other than the date and Ms. Felderhof's signature. Finally, Jenkens argued that its payment of income tax on the home in 1997, and its maintenance of the home over ten years show that Ms. Felderhof intended to

transfer full ownership of the Travis Close stock and the Williamsburg home.

To support the factual allegations in her defense, Ms. Felderhof presented her own affidavit, as well as letters exchanged between her and Kontrimas in 2006 regarding the Williamsburg home.[5] Ms. Felderhof's affidavit states that "Andrius assured me that my house in Virginia would be maintained by his firm and returned to me after the firm's engagement was concluded if all outstanding bills to his firm were paid in full. It was Andrius's promises to maintain the house and return it to me if and when I paid all of his firm's legal fees that led me to transfer the house to his firm." Prior to Jenkens' filing its interpleader complaint, Ms. Felderhof wrote two letters to Kontrimas. They reinforce her alleged understanding of the agreement regarding the Travis Close stock and the Williamsburg home. In the letters, Ms. Felderhof requests that Jenkens arrange to transfer the home back to her. In response to Ms. Felderhof's letters, Kontrimas wrote that "There was never a caretaker arrangement." However, his letter also states that "I did tell you that my Firm and I would do the right

[5] Ms. Felderhof also submitted an affidavit from her Cayman counsel, Chapman. However, because Chapman did not represent Ms. Felderhof until 1999, he provides no testimony based on personal knowledge of the 1997 stock transfer. However, his affidavit does state that, "Mrs. Felderhof always told me that her understanding was that the residence would have to be returned to her after the firm's engagement was concluded if all outstanding bills to [Jenkens] were paid in full."

thing regarding Travis Close," and that "other than reimbursement of the fees, expenses, and income tax" associated with Jenkens' holding the house for the previous ten years, "my law firm is not claiming any interest in the house or proceeds of sale." His letter continues, "We have attempted to follow what I thought was the right thing to do under the terms of our agreement and current circumstances. Unfortunately, there does not appear to be an agreement with my suggested course of action." Finally, Kontrimas indicates in his letter that if a law suit was commenced, he would "likely . . . be a fact witness in the litigation to testify as to the facts surrounding the legal engagement and continuing representation." Ms. Felderhof argues that Kontrimas' letter supports her contention that there was an agreement regarding transfer of the stock and the home that did not involve the assets becoming part of Jenkens' nonrefundable retainer. Ms. Felderhof also argues that Jenkens' holding the home for ten years without selling it provides circumstantial support for her understanding: that Jenkens only held the home as security until all fees were paid, when it would be returned to her.

The record clearly supports the fact that Ms. Felderhof transferred the stock of Travis Close to Jenkens. However, with regard to the details of the transfer of the Travis Close stock and the Williamsburg home, the record on appeal essentially reduces to a swearing match by affidavit. Kontrimas and Groia aver that the stock and home were transferred

outright to fulfill the retainer obligation set forth in the Modified Agreement, while Felderhof avers that the assets were transferred merely as security to ensure payment of fees. Ms. Felderhof's motion and the evidence submitted to the district court provided definite factual allegations, as opposed to mere legal conclusions, in support of her defense. *See Moldwood Corp. v. Stutts,* 410 F.2d 351, 352 (5th Cir.1969) (stating that a defendant must make a "clear and specific showing . . . by [a] definite recitation of facts" that the defendant has a valid defense). And her "defense is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." *Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 98 (2d Cir.1993); *see* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure: Civil 3d § 2697 (1998) ("The underlying concern is to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default."). Because Ms. Felderhof provided definite factual allegations with supporting record evidence that, if believed at trial, would lead to a result contrary to that achieved by the default, we cannot assume that the district court rested its denial of Rule 60(b)(1) relief on the lack of a meritorious defense. *Cf. Gomes v. Williams,* 420 F.2d 1364, 1366 (10th Cir.1970) (noting that "bald allegation, without supporting facts underlying the defense, will not sustain the burden of the defaulting party under Rule 60(b)").

Next, we note that a number of the other factors listed in *Dierschke* arguably cut in favor of Ms. Felderhof. Along with her potentially "meritorious" defense, Ms. Felderhof claims that she stands to suffer a "significant financial loss," because the home is currently listed for sale at approximately $1.3 million. *See Seven Elves, Inc. v. Eskenazi,* 635 F.2d 396, 403 (5th Cir.1981) (recognizing that the large value of a $250,000 claim against the defendant "itself militat[ed] in favor of a full trial on the merits."). Also, Jenkens appears to present ineffectual claims of prejudice; its briefing on appeal merely refers to expected difficulties Jenkens may face if forced to proceed with further litigation. *See Lacy,* 227 F.3d at 293 (5th Cir.2000) (indicating that delay, or requiring a plaintiff to prove his case does not constitute prejudice). Finally, Ms. Felderhof claims that she expeditiously responded once she learned of the default. Though it took her a month to obtain local counsel and file her motion for relief from judgment, she presented affidavit testimony from herself and Chapman indicating that she began her search for local counsel immediately but ran into a number of unexpected difficulties including slow responses from the local counsel she sought, and conflicts of interest that prevented others from representing her in the matter. The district court did not address any of these factors.

Finally, we reach the issue of willfulness. If Ms. Felderhof's default was willful then the district court's denial of 60(b)(1) relief may be affirmed on

that ground alone. *See Dierschke,* 975 F.2d at 184-85. Again, the district court made no finding as to willfulness, so in considering whether a remand is necessary, we must ask whether the record precludes a finding in Ms. Felderhof's favor.

We have already determined that the record precludes Ms. Felderhof from establishing she was not served with a summons. But this fact is not dispositive of Ms. Felderhof's willfulness. We have recognized that even where a defendant mistakenly concludes that he was not served with process, the defendant's default may not be willful. *See Lacy,* 227 F.3d at 292-93 (Where defendant mistakenly assumed it was not served but maintained contact with plaintiff concerning matter of litigation, default was not willful.). On the other hand, we have affirmed a lower court's finding of willfulness where the lower court determined that the defendant simply "chose to play games with the court" and "chose to make a decision that he hadn't been served when, in fact, he had." *Dierschke,* 975 F.2d at 184. In sum, perfection of service is not determinative – the defendant's knowledge of the perfected service, and the defendant's actions post-service also play a role in measuring the willfulness of a defendant's default.

Ms. Felderhof contends that even if there was a summons in the papers served on her, it was inadvertently lost; and thus, neither she nor her counsel ever knew of the duty to answer the complaint. She contends that her claims to ownership of the Williamsburg home, evidenced in her letters to Kontrimas,

suggest that she would not allow a default judgment to be entered against her because such a judgment would deprive her of any interest in the home. She also claims that her expeditious forwarding of all legal papers to her attorney shows that she did not intend to avoid litigation or "play games" with the court.

Nonetheless, even were the summons never seen, Ms. Felderhof received other forms of notice of the interpleader action.[6] Chapman saw the complaint in his office twelve days after Ms. Felderhof was served. Ms. Felderhof also admits that she later received an order for a pre-trial scheduling conference. She and Chapman aver that they intended to be at the conference (which never occurred because of the entry of default), because they assumed that the conference would yield greater detail as to what was required of Ms. Felderhof in light of never seeing the summons nor receiving further instructions for answering the complaint. As the conference never occurred, Ms. Felderhof did not have the opportunity to make good

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[6] Jenkens contends that Ms. Felderhof willfully evaded service, thus suggesting willfulness in her failure to answer. Even were we to accept Jenkens' claims of willful evasion of service (which Ms. Felderhof disputes), intentionally evading service is "insufficient to make a defendant's failure to answer willful," *Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 374 (D.C.Cir.1980), because the duty to answer only arises after service has been perfected. *Cf. Lacy*, 227 F.3d at 292 n. 5 (noting that willful evasion of service is not grounds to support an entry of default).

on what she now avers to have been her intent to attend. Still, she contends that her plan to attend supports her claim that she did not seek to avoid litigation of the matter. Finally, despite receiving the complaint and the order for conference, the only recourse actually taken by Ms. Felderhof prior to entry of default was to check the local court registry in Grand Cayman for any pending filings against her.

Because there are no countervailing equities (*i.e.*, because Jenkens has not presented a legitimate claim of prejudice that would arise from setting aside the default), "any doubt should, as a general proposition, be resolved in favor of [Ms. Felderhof] to the end of securing a trial upon the merits." *Gen. Tel. Corp. v. Gen. Tel. Answering Serv.*, 277 F.2d 919, 921 (5th Cir.1960). While there is evidence suggestive of willfulness on the part of Ms. Felderhof, resolving doubts in Ms. Felderhof's favor, we do not believe the record conclusively shows that her default was willful. Shortly prior to the filing of the complaint, Ms. Felderhof engaged in regular correspondence with Jenkens concerning the dispute over the Williamsburg residence. As the record reflects her contemporaneous intent to claim ownership of the Williamsburg residence, it would be quite strange for Ms. Felderhof to willfully default when doing so would destroy her interest in the home. Moreover, assuming a summons was served, resolving doubt in Ms. Felderhof's favor, we also must assume that neither she nor her attorney ever saw the summons, and that they were legitimately confused as to their

responsive duties under the circumstances. Finally, while the initial scheduling conference never occurred, we cannot entirely discount the sworn affidavit testimony from Ms. Felderhof and her attorney that they planned to attend the pre-trial conference under the mistaken assumption that the conference would yield further guidance with respect to the interpleader complaint received from Jenkens. While Ms. Felderhof was not the model of a properly responsive defendant, we cannot say that this sparse record *requires* a court to find her default willful.

As noted above, a number of the factors relevant to a good cause determination under Rule 60(b)(1) appear to cut in Ms. Felderhof's favor – and the record does not indisputably support a denial of Rule 60(b)(1) relief on "willfulness" grounds. While the record does not require a finding of willfulness, neither does the record preclude such a finding. Without guidance from the district court as to the basis for its Rule 60(b)(1) decision, we cannot determine whether the district court abused its discretion; and we are, thus, constrained to vacate this portion of the district court's order. *See Enron Oil,* 10 F.3d at 96-97 (noting that a district court's lack of findings or explanation in support of its Rule 60(b) denial may "defeat intelligent appellate review").

IV

For the foregoing reasons, we AFFIRM the district court's denial of relief from default judgment

under Rule 60(b)(4). We VACATE the district court's denial of relief under Rule 60(b)(1) and REMAND. If, on remand, the district court determines that its denial of Ms. Felderhof's motion under Rule 60(b)(1) is supported by the current record, then the district court need only issue a more detailed ruling sufficient to resolve that which currently hinders our review. Otherwise, the district court is instructed to institute further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JENKINS & GILCHRIST, A PROFESSIONAL CORPORATION,	§	
Plaintiff,	§	
v.	§	Civil Action No.
GROIA & COMPANY, A PROFESSIONAL CORPORATION, JOHN FELDERHOF, and INGRID FELDERHOF,	§	H-06-3590
Defendants.	§	

ORDER

Pending before the Court are Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document No. 23) and Defendant Ingrid Felderhof's Motion for Leave to File Original Answer (Document No. 26). Having considered the motions, submissions, and applicable law, the Court determines the motions should be denied. Accordingly, the Court hereby

ORDERS that Defendant Ingrid Felderhof's Motion to Vacate Order on Entry of Default and Set Aside Final Judgment (Document No. 23) is DENIED. The Court further

ORDERS that Defendant Ingrid Felderhof's Motion for Leave to File Original Answer (Document No. 26) is DENIED.

SIGNED at Houston, Texas, on this the 2 day of April, 2007.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20296

JENKENS & GILCHRIST,
A PROFESSIONAL CORPORATION

Plaintiff-Appellee

v.

GROIA & COMPANY,
A Professional Corporation

Defendant-Appellee.

v.

INGRID FELDERHOF

Defendant-Appellant

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Appeal from the United States District Court for the
Southern District of Texas, Houston

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ON PETITION FOR REHEARING

(Filed Sep. 24, 2008)

Before JONES, DAVIS and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge